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**Dignity Health d/b/a St. Rose Dominican Hospitals
and Michael S. Dela Paz.** Case 28–CA–094717

June 12, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON,
AND SCHIFFER

On September 23, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The Respondent terminated employee Michael Dela Paz after he circulated a petition soliciting signatures from employees who had concerns about a coworker's attitude and conduct toward them and presented those complaints to the coworker's supervisor. The judge found that Dela Paz did not engage in protected concerted activity, but his discharge was nonetheless unlawful because the Respondent maintained overbroad and discriminatory rules and discharged Dela Paz pursuant to them. For the reasons discussed below, we reverse the judge's findings. Although we agree that the discharge of Dela Paz was unlawful, we find that the Respondent did not maintain unlawful rules. Rather, Dela Paz was unlawfully discharged for engaging in protected concerted activity.

I. FACTS

Since 2007, Dela Paz has performed housekeeping work at the Hospital as a member of the Respondent's environmental services department. Among his many duties, he cleaned the cafeteria floor. He also frequently bought food at the cafeteria. Dela Paz had frequent contact with cafeteria cashier Habiba Araru, and the two did not get along. On or about June 4, 2012,² Dela Paz approached Araru's register with hot dogs and rice, and she

informed him that she would have to charge him for two entrees. The record is unclear, but Araru may have commented that "Filipinos don't know . . . hot dogs go with bread, not rice," and Dela Paz may have threatened that he would "take care of [her]." Araru reported the incident, and the Respondent took seriously Araru's claim that Dela Paz had threatened her. On June 5, Environmental Services Manager Brad Duda telephoned Dela Paz and informed him that he would be on administrative leave until the Respondent completed its investigation of the incident. Duda added that Dela Paz was not to contact any hospital employees during his administrative leave.

While on leave, Dela Paz asked a union officer for her advice. That officer advised collecting witness statements and statements attesting to Dela Paz's character. Although Dela Paz obtained signed statements from three employees attesting to his good character, complaining about Araru, or both, he also circulated a petition on his own initiative with a cover page that read:

If at one time or another you had ever had an encounter with [Araru], the cashier at the Cantina—if she had ever been rude to you or if perhaps you observed that she has treated someone else with disrespect or a sullen attitude, kindly sign your name on the attached paper in support of my signature campaign.

Dela Paz collected signatures by approaching employees whom he knew had concerns about Araru's behavior, and those employees recommended others who also had concerns. By June 12, 17 employees had signed the petition.

On June 12, Manager Duda met with Dela Paz. Dela Paz gave Duda the three employee statements, the petition, and a written statement describing his side of the story and his own concerns about Araru's unprofessional attitude. Duda read the documents, thanked Dela Paz for them, and did not mention them again during the meeting. Duda suspended Dela Paz for making threatening and harassing statements during his altercation with Araru,³ counting Dela Paz' 7-day administrative leave as his suspension. Duda told him that the matter was now closed and "that the expectation was that he would not retaliate and that as long as he didn't do so, he would remain in good standing and be employed." Duda gave Dela Paz an "Action Plan" that outlined the conditions for Dela Paz to keep his job. One condition read, "Employee will not retaliate against co-workers when information or feedback given. There will be ZERO tolerance for any perceived retaliation against coworkers."

¹ We shall amend the judge's conclusions of law in accordance with our findings herein. We shall modify the judge's recommended Order and substitute a new notice to conform to our findings, the Board's standard remedial language, and in accordance with our decisions in *J. Picini Flooring*, 356 NLRB No. 9 (2010), and *Durham School Services*, 360 NLRB No. 85 (2014).

² All dates refer to 2012 unless otherwise noted.

³ The General Counsel has not alleged this suspension to be unlawful.

After Dela Paz returned to work, he continued collecting signatures on his petition because employees who also had problems with Araru asked to sign it. On June 16, Dela Paz approached Araru's supervisor, Brad Wild. He gave Wild a copy of the petition, which now bore 28 signatures, and a copy of the written statement Dela Paz had submitted to Duda on June 12. On June 18, Dela Paz also gave the updated petition to Duda's superior, Environmental Services Director Lee Timothy. Timothy told Dela Paz that "if he accept[s] this paper, [Dela Paz] might be separated" from the Respondent. On June 20, Wild relayed his June 16 encounter with Dela Paz to Duda and Timothy.

On July 3, Duda summoned Dela Paz to the human resources office and discharged him. His termination notice explained:

One expectation of the action plan outlined zero tolerance for any retaliation against the employee with whom he had the altercation. Mr. Dela Paz has failed to meet this expectation. Since returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined. He has approached coworkers and management alike in an attempt to smear the reputation of the other employee and try to get her fired. Such actions demonstrate an unwillingness to follow the simple expectations of the action plan and represents blatant insubordination.

II. ANALYSIS

The judge found that the Respondent violated Section 8(a)(1) of the Act by promulgating unlawful work rules when Duda instructed Dela Paz not to contact other employees during his administrative leave and not to retaliate against Araru. The Respondent excepts, arguing that Duda's instructions were not work rules. We agree.⁴ Instructions directed solely at one employee that "were never repeated to any other employee as a general requirement" are not work rules. *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 1 & fn. 5 (2014); see also *Teachers AFT New Mexico*, 360 NLRB No. 59, slip op. at 1 fn. 3 (2014) (no evidence the employer's statements were communicated to other employees or would be reasonably construed as establishing a new rule or policy). Here, Duda's instructions were directed only to Dela Paz, and the General Counsel presented no evidence that the same instructions were ever

⁴ In his conclusions of law, the judge implicitly found merit in the General Counsel's allegation that, during the July 3 termination meeting, the Respondent promulgated a rule prohibiting employees from enlisting the assistance of their coworkers. We reverse this finding for the same reasons discussed below.

given to any other employee.⁵ As the Respondent did not promulgate any rules, we also reverse the judge's finding that the Respondent violated Section 8(a)(1) by discharging Dela Paz pursuant to unlawful rules.

The General Counsel also alleged that the Respondent violated Section 8(a)(1) because it discharged Dela Paz for his protected concerted activity of continuing to circulate, after his June 12 suspension meeting, the petition about Araru's attitude and presenting that petition to Wild.⁶ The judge dismissed this allegation because, although he implicitly agreed that Dela Paz' conduct was concerted, he found that it was not for the purpose of mutual aid or protection under *Holling Press, Inc.*, 343 NLRB 301 (2004). In his view, "Dela Paz was pursuing a purely personal claim."⁷ We disagree that the activity for which the Respondent discharged Dela Paz was not for the purpose of mutual aid or protection.

Section 7 protects activity when it is both "concerted" and "for the purpose of . . . mutual aid or protection." See *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Dela Paz' conduct was unquestionably concerted. His petition sought to enlist the assistance of his coworkers, and 28 coworkers in fact joined him in expressing concerns about Araru's attitude. See *id.* at 885–886. Not only did they sign the petition, but many also referred Dela Paz to other concerned employees or approached him to offer their support. Dela Paz later brought the group complaint to the attention of management when he approached Wild. See *id.* at 887.

⁵ The General Counsel never alleged that Duda's instructions otherwise violated Sec. 8(a)(1), and we find no other basis for so finding. Duda instructed Dela Paz on June 5 not to contact other employees during his administrative leave—over 6 months before Dela Paz' December 11 charge. An allegation that the statement violated the Act would be time-barred by Sec. 10(b). Moreover, under the circumstances of this case, Duda's June 12 no-retaliation instruction would not "reasonably tend to interfere with, restrain, or coerce an employee in the exercise of his Section 7 rights." *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1427 (2007). We find below that circulating the petition was Sec. 7 activity. Duda, however, thanked Dela Paz when he submitted the petition during the June 12 meeting, and Duda never indicated at that time that there was anything wrong with Dela Paz' circulating it. Thus, Dela Paz would not reasonably believe that continuing to engage in the Sec. 7 activity of circulating the petition would constitute the sort of retaliation against Araru that he had agreed to refrain from.

⁶ We adopt the judge's finding, for the reasons stated in his decision, that the Respondent did not violate Sec. 8(a)(3).

⁷ The judge found that the Respondent discharged Dela Paz for his continuing to circulate the petition and not because he presented it to Wild. We disagree. The termination notice, quoted above, references Dela Paz' approaching coworkers and management. As explained below, circulating the petition and presenting the group complaint to Wild were both protected concerted activity.

To be for the purpose of mutual aid or protection, concerted activity must seek to “improve terms and conditions of employment or otherwise improve [employees’] lot as employees.” *Eastex v. NLRB*, 437 U.S. 556, 565 (1978). In *Holling Press*, supra, one employee, Fabozzi, attempted to get another employee to testify on her behalf before a state agency in support of Fabozzi’s sexual harassment claim. The Board found that this was not for the purpose of mutual aid or protection where, among other considerations, there was no evidence that any other employee “had similar problems—real or perceived—with a coworker or supervisor,” and the employee whom Fabozzi solicited to testify did not want to support her. 343 NLRB at 302.⁸

Here, by contrast, many employees had real or perceived problems with Araru’s attitude in the workplace affecting their working conditions. Those employees wanted to and did support Dela Paz’ petition. Although personal vindication may have been among Dela Paz’ goals, that does not mean Dela Paz failed to “embrace[] the larger purpose” of drawing management’s attention to Araru’s attitude for the “benefit of all of his fellow employees.” *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) (finding protected concerted activity even though an employee’s own need to care for his wife and children sparked his efforts to seek sick leave for family medical emergencies). On these facts, we find that Dela Paz’ continuing to circulate the petition and presenting it to Wild was concerted activity for the purpose of mutual aid or protection.

Accordingly, as the Respondent knew that Dela Paz’ activities were concerted and discharged Dela Paz for engaging in those protected concerted activities, we find that the Respondent violated Section 8(a)(1).⁹

Finally, we reverse the judge’s dismissal of the allegation that the Respondent, by Manager Timothy, violated Section 8(a)(1) by threatening Dela Paz with termination when Dela Paz gave Timothy the updated petition. The judge found Timothy’s statement lawful based on his prior finding that Dela Paz’ circulating the petition was not protected concerted activity. Because we find above

that Dela Paz did engage in protected concerted activity, we find the 8(a)(1) threat violation.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge’s Conclusion of Law 3.

“3. The Respondent violated Section 8(a)(1) of the Act by threatening Michael Dela Paz with discharge on June 18, 2012, for his protected concerted activity of circulating a petition concerning a coworker’s attitude.”

2. Substitute the following for the judge’s Conclusion of Law 4.

“4. The Respondent violated Section 8(a)(1) of the Act by discharging Dela Paz on July 3, 2012, for his protected concerted activity of circulating a petition concerning a coworker’s attitude and presenting those group complaints to the coworker’s supervisor.”

ORDER

The National Labor Relations Board orders that the Respondent, Dignity Health d/b/a St. Rose Dominican Hospitals, Henderson, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they engage in protected concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Dela Paz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dela Paz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge’s decision.

(c) Compensate Dela Paz for any adverse income tax consequences of receiving his backpay in one lump sum, and file a report with the Social Security Administration allocating his backpay to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dela Paz and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

⁸ Member Schiffer observes that no party in this case has asked the Board to revisit *Holling Press*. Accordingly, she expresses no view on whether that case was correctly decided. She agrees, however, that it is distinguishable from the present case.

⁹ *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). As we find that approaching Wild to present employees’ complaints about Araru was also protected concerted activity, we find no merit in the Respondent’s asserted affirmative defense that it would have discharged Dela Paz anyway for approaching Wild.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Henderson, Nevada facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 12, 2014

Phillip A. Miscimarra, Member

Harry I. Johnson, III, Member

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge because you engage in protected concerted activities.

WE WILL NOT discharge you because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of the Board's Order, offer Michael Dela Paz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dela Paz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Dela Paz for any adverse income tax consequences of receiving his backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating his backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dela Paz, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITALS

ST. ROSE DOMINICAN HOSPITALS

The Board's decision can be found at www.nlr.gov/case/28-CA-094717 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Nathan Higley, Esq., for the General Counsel.
James Winkler, Esq. (Littler Mendelson, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on August 6, 2013, in Las Vegas, Nevada. The complaint herein, which issued on April 30, 2013, and was based upon an unfair labor practice charge and an amended charge filed by Michael Dela Paz, an individual, on December 11, 2012¹ and January 22, 2013, alleges that since June 11 Dignity Health, d/b/a St. Rose Dominican Hospitals, herein the Respondent, has maintained an overly broad and discriminatory rule prohibiting employees at its Sienna facility from discussing discipline Respondent issued to them. It is further alleged that from June 11 until about July 3, Dela Paz engaged in protected concerted activities with other employees by circulating a petition at its facility requesting employees to complain about a coworker being rude to them, by soliciting letters from other employees and by asking them to sign a petition about the actions of this coworker, and that he engaged in these activities at the request of the Union. The complaint also alleges that on about June 28, Respondent by Lee Timothy, the director of the EVS department, and an admitted supervisor and agent of the Respondent, threatened employees with discharge for engaging in concerted activities, that on about July 3, Respondent, by Brad Duda, the manager of the EVS department, and also an admitted supervisor and agent of the Respondent, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from engaging in certain protected concerted activities, and on about July 3, Respondent discharged Dela Paz for engaging in union activities and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2012.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act, and that Service Employees International Union Local 1107, herein the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Stated briefly, Dela Paz, a maintenance employee at the hospital, had a disagreement with Habiba Araru, a/k/a "Mustah" a cashier at the hospital cafeteria. As a result of this disagreement, Dela Paz was suspended for 5 days without pay, although there is no allegation that this suspension violated the Act. After being suspended, Dela Paz approached employees at the hospital and asked them to sign a petition if Araru had been rude to them or to other employees, and he gave this petition to Araru's supervisor and was discharged.

Dela Paz has been employed by the Respondent as an environmental service tech employee (a housekeeping employee) since March 2007. He is a member of the Union, which represents that unit, and works the 11 p.m. to 7:30 a.m. shift. His direct supervisor is Eddie Aguilar; his manager is Brad Duda. There was an incident involving Dela Paz and Araru on June 1, according to Duda's testimony; Dela Paz testified that there was also a second incident on June 4. Duda testified that he was notified of the incident by the security supervisor shortly after June 1, and was given a statement about the incident prepared by Araru. The statement states that when Dela Paz went to pay for his food, Araru told him that as he had two entrees she would have to charge him for them, but that she didn't want him to think that she was overcharging him. He replied, "I've already reported you and I'll take care of you." She also told the security department that she was concerned for her safety and would like more security in the area. Duda discussed the situation with Timothy, his supervisor, and they decided that Dela Paz would be put on administrative leave while they conducted a further investigation, and Duda called Dela Paz and told him that he was being placed on administrative leave. Duda testified that he also notified the Union that Dela Paz was being put on administrative leave.

A meeting was held on June 12 with Duda, Dela Paz, Pam Bylekie, a supervisor of operators and transporters, and Debbie Miller a union representative. At this meeting, Dela Paz gave him a petition dated June 11, stating:

Signature Campaign in Support of Mhike Sanchez

If at one time or another you had ever had an encounter with Mustah, the cashier . . . if she had ever been rude to you or if perhaps you had observed that she has treated someone else with disrespect or a sullen attitude, kindly sign your name on the attached paper in support of my signature campaign.

There were 17 employee signatures attached to the petition. In addition, Dela Paz gave him statements written by three employees, none of whom witnessed the incident. The first heard only a loud noise, the second was critical of Araru's attitude

and rudeness, and the third spoke of what a nice person Dela Paz was. Duda looked over these documents and told Dela Paz that he would retroactively count the administrative leave as a suspension, and that Dela Paz could return to work, and Bylekie and Miller agreed. He also told Dela Paz that the matter was closed, "... and that the expectation was that he would not retaliate and that as long as he didn't do so, he would remain in good standing and be employed." Dela Paz was given an employee counseling report that day stating that he had been suspended for 7 days without pay because Araru felt threatened and harassed by his statements. It further states that he was given copies of the Respondent's policies re: harassment in workplace, workplace conduct, zero tolerance of workplace violence and standards of conduct, and that he was "... to strictly adhere to these policies with 100% compliance." Attached to the employee counseling report was an action plan that Dela Paz was required to follow. One item listed states: "Employee will not retaliate against co-workers when information or feedback given. There will be ZERO tolerance for any perceived retaliation against co-workers."

Dela Paz testified that he ate at the cafeteria three times a day, 5 days a week, where he often encountered Araru. His job included cleaning and sweeping the floors in the cafeteria, and on June 1 he saw her cleaning the tables in the cafeteria, and dropping the ketchup packets on the floor. He asked her if she could pick them up and she said that wasn't her job. Later that evening he told Aguilar about what occurred and on the following morning he told Duda about the incident, and Duda said that he would discuss it with Aguilar. On June 4, he went to pay for some food that he had chosen, rice and hot dogs, and Araru said, "You Filipinos don't know how to eat, hot dogs go with bread, not rice." Dela Paz, who is Filipino, was upset, but only said, "Whatever is on my plate I'm paying for" and walked away. Later that evening he told Aguilar about the incident, and Aguilar told him to just do his job, not to worry about it. On the morning of June 5 he received a telephone call from Duda, who told him not to report for work, and not tell the Union, or his friends at the hospital, and he would contact him when to return, but he never gave him a reason for the suspension. On June 7, Duda sent an email to Timothy notifying him that Dela Paz would be on administrative leave pending the conclusion of an investigation into the incident. The email concluded:

Michael was also instructed that he was not to contact any hospital employees during his administrative leave. I asked Michael if he understood my instructions regarding his administrative leave and not contacting any hospital employees and he said that he did and would follow them.

Dela Paz testified further that he went to the collective-bargaining session on June 5 where he told Union representative Debbie Miller about his suspension and she said that she was unaware of it. There was a meeting at the hospital with Dela Paz, Duda, Timothy, and Cherie Mancini, the union steward. Brad Wild, Araru's supervisor, participated by phone. They spoke about his incident with Araru and he was told that he was being suspended for threatening and harassing Araru. He testified that during this meeting, Timothy told him to ob-

tain statements from people who witnessed the event. Mancini, who is employed by the Respondent as a senior operating room buyer and is a union steward, testified that a few days after June 4, while she was at work, Dela Paz told her that he had been disciplined over the incident with Araru, and he asked her what he could do to defend himself against the charges and she told him to obtain statements from people who witnessed the incident.

On June 16, Wild, Araru's supervisor, was approached by Dela Paz, who told him of his suspension due to the incident with Araru. Dela Paz then gave Wild the same petition that he had given Duda on June 12, but this one was signed by 28 employees, 11 more than the earlier one. Wild told Dela Paz that he would make sure that Duda and Timothy were given this petition. Wild sent an email to Timothy and Duda stating that on June 13, a unit manager of Respondent gave him a copy of Dela Paz' earlier petition signed by 17 employees, stating that she found it on the nurses' station, and on June 16, Dela Paz approached him and gave him a petition that had more signatures than the earlier petition. Duda determined that by giving Wild this petition with the added signatures, Dela Paz violated the no retaliation provision contained in the action plan that was given to him on June 12, as well as the no contact with other employee's restriction and, therefore, he should be terminated. He testified that the petition was a concern to him, "Because he continued to circulate the petition and violate the Action Plan." He testified further: "Moving forward with it, gaining additional signatures, I didn't tell him specifically that, but I would consider any ... additional activity on his part in the like manner to be a violation." He considers retaliation any soliciting or trying to get the other employee in trouble and he considered Dela Paz' approaching Wild with the petition to be retaliation because, "He was trying to get the other employee in trouble or trying to provide information to cause trouble for the other employee." In attempting to explain this situation further, Duda testified that "The appropriate chain of command ... to resolve these issues is first to go to your immediate supervisor ... and allow supervisors to bring these things to each other's attention and come up with a resolution." Going to someone else's supervisor constitutes retaliation. He, along with Timothy and Scott Fuller, from human resources, determined that Dela Paz would be terminated:

Q. And that was prompted by your conversation with Mr. Wild?

A. It was prompted by the interaction from, between, Mr. Wild and Mr. Dela Paz.

Q. And by the petition? Is that correct?

A. I was strictly focusing on the fact that he was approached by Mr. Dela [Paz] ... that Mr. Wild was approached by Mr. Dela Paz.

Q. Was the petition a factor?

A. In his termination?

Q. Yes.

A. No.

Dela Paz was terminated at a meeting on July 3. Present at this meeting were Dela Paz, Duda, Miller, and Mancini, as was

LeRoy Walker, from Respondent's human resources department. Duda was again asked why Dela Paz was terminated:

A. I mean, I terminated him based off of his approaching Mr. Brad Wild.

Q. Okay. And that's it?

JUDGE BIBLOWITZ: As far as you were concerned?

A. As far as I'm concerned, that was the grounds for moving forward with that, yes. . . .

Q. And was it limited to just Mr. Dela Paz's interaction with Brad Wild?

A. We were concerned about the fact that the document continued to circulate, but it was not until he went to Brad Wild that we considered his actions crossing the line.

Q. Had he not gone to Brad Wild, then he would not have been terminated?

A. He would not have been.

At the July 3 meeting Dela Paz was given another employee counseling report, this one stating that he was being terminated. The report refers to the earlier action plan and states:

One expectation of the action plan outlined zero tolerance for any retaliation against the employee with whom he had an altercation. Mr. Dela Paz has failed to meet this expectation. Since returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined. He has approached coworkers and management alike in an attempt to smear the reputation of the other employee and try to get her fired. Such actions demonstrate an unwillingness to follow the simple expectations of the action plan and represents blatant insubordination. Mr. Dela Paz is apparently unwilling to meet the conditions required of him for his continued employment with SRDH.

Dela Paz testified that after his suspension he continued getting signatures on his petition because he "wanted to find the true story." He obtained these signatures from hospital employees by learning from other employees who was having problems with Araru at the cafeteria and he approached these employees with his petition. He testified that he gave this updated petition to Timothy on June 18 while Timothy was in his office and Timothy told him that if he accepted the petition, Dela Paz might be fired. He gave it to him and walked away. On July 3, Timothy told him to come to his office at 1. In addition to Timothy, Duda, Walker, Miller, and Mancini were present, as were two security guards. He testified that Duda told him that he was terminated because he left a copy of the petition at a copy machine at the facility, which violates HIPPA.² However, when he was then asked if Duda explained the reason for his discharge, he testified, "Because I gave it to . . . Brad Wild. . . ." The security guards then escorted him out of the building.

III. ANALYSIS

In making my findings herein, I have discounted some of Dela Paz' testimony, not because I found his testimony to lack

² Duda testified that he never told Dela Paz on July 3 that his conduct was a violation of HIPPA.

credibility, but because he appeared to make some obvious errors in his testimony. For example, he testified that Timothy told him to obtain signatures from employees supporting his version of the incident with Araru. However, as Mancini testified, the more logical testimony is that she told him to obtain the signatures. In addition, Dela Paz testified that Duda told him that he was being terminated for violating HIPPA rules. Duda impressed me as a very savvy manager, and I find it unlikely that he would use that as a reason for terminating a maintenance employee. On the other hand, I found Duda to be a generally credible witness, albeit one who had difficulty admitting that it was the petition, not the fact that Wild was the recipient of it, that was the cause of the termination. However, this was clearly established by documentary and other evidence.

The initial allegation herein is that since about June 11 the Respondent has maintained an overly broad and discriminatory rule prohibiting employees at the facility from discussing discipline that the Respondent had issued to them. This relates to the warning that Duda gave to Dela Paz on June 12 that he would count the administrative leave as the suspension, but ". . . the expectation was that he would not retaliate [against Araru] and that as long as he didn't do so, he would remain in good standing and be employed." He also told Dela Paz not to contact any hospital employees during his leave. In addition, the action plan that was attached to the employee counseling report said pretty much the same thing: "Employee will not retaliate against co-workers when information or feedback given. There will be ZERO tolerance for any perceived retaliation against co-workers." It is alleged that Duda's statements to him and that the similar restriction contained in the action report, violate Section 8(a)(1) of the Act. Further, it is similarly alleged that on about July 3, the Respondent, by Duda, has promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from engaging in the protected concerted activities by enlisting the assistance of their fellow employees to protect their employment rights. These activities are alleged to violate Section 8(a)(1) of the Act.

Although Duda's warning, the action report and the counseling report are vague in that they prohibit retaliation, later events (Dela Paz' termination) make clear that the term retaliation was meant to include petitioning his fellow employees to support him against the allegations of Araru, and his suspension; in other words, his ability to engage in concerted activities. In addition, Duda's June 7 email to Timothy states that he told Dela Paz not to contact any hospital employee during his leave. In *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), the Board stated: "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." See also *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012). *Keller Ford*, 336 NLRB 722 (2001), presented a similar fact pattern. In that case, the charging party was unhappy with the timing of the increase in the employer's copayment for his life and disability insurance, and complained to his supervi-

sor about it. When the charging party said that he would discuss it with other employees, the supervisor told him: “Don’t go getting everybody riled up about this. It could be hazardous to your health.” Finding that this statement would reasonably tend to interfere with the employee’s free exercise of his right under Section 7 to discuss his concerns regarding terms and conditions of employment with fellow employees, the Board found that this statement violated Section 8(a)(1) of the Act. Further, in *KSL Claremont Resort, Inc.*, 344 NLRB 832 (2005), the Board stated:

We find that the rule’s prohibition of “negative conversations” about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.

The same is true in the instant matter. Telling Dela Paz not to contact other employees clearly violates the Act; telling him not to retaliate, could have a few meanings, some lawful, some not, but later events established that it was restricting his Section 7 rights to obtain the support of his fellow employees, in violation of Section 8(a)(1) of the Act.

The final allegation is that Dela Paz was terminated in violation of the Act for a number of reasons: (1) that he was terminated for engaging in the protected concerted actions of petitioning his fellow employees to assist him in the incident involving Araru, in violation of Section 8(a)(1) of the Act; (2) that he was terminated for violating the “no retaliation rule” set forth above which I have found violates Section 8(a)(1) of the Act, also allegedly in violation of Section 8(a)(1) of the Act; and (3) that he was terminated for following the Union’s advice in obtaining signatures supporting his position regarding the incident with Araru, in violation of Section 8(a)(1) and (3) of the Act.

In *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), the issue was whether the charging party was engaged in activity encompassed by Section 7 of the Act. The Board discussed *Meyers I* and *Meyers II*³ and stated:

In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of “mutual aid or protection.” These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

Although individual action will be considered concerted if “the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group,” *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), employees who are pursuing a personal claim, even with the support of fellow employees, do not enjoy the protection of Section 7 of the Act.⁴ In the situation herein, Dela Paz was pursuing a purely personal claim regarding the incident with Araru and his fear of discipline. No other employee was involved in the dispute. The participation

of the other employees was simply to affirm that, at some point, Araru had been rude to them or that they had observed her showing disrespect to someone else. The dispute was solely between Dela Paz and the Respondent. The Board, in *Holling Press*, supra, dismissed the complaint finding that although the charging party’s actions were concerted, they were “personal” to her and therefore not for mutual aid or protection. The Board stated that she “. . . chartered a course of action with only one person in mind—Fabozzi herself. To begin with, Fabozzi’s complaint was individual in nature . . . [with a] purpose to advance her own cause.” Similarly, I find that Dela Paz’ dispute with the Respondent was strictly personal, and that the support of his fellow employees did not convert it to activities protected by Section 7 of the Act.

It is next alleged that the discharge of Dela Paz violated Section 8(a)(1) of the Act because he was fired for violating Duda’s “no retaliation” rule, and the rule forbidding him from talking to other employees. Board law is clear that the imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act. I have found that Duda’s no talking to other employees during his suspension, and the no retaliation rule are overly broad and unlawful. By firing Dela Paz for violating these rules, by obtaining additional signatures on his petition, the Respondent violated Section 8(a)(1) of the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004); *Northeastern Land Services*, 352 NLRB 744 (2008).

It is further alleged that the discharge of Dela Paz on July 3 also violates Section 8(a)(1) and (3) of the Act. In some situations, an 8(a)(1) discharge will also violate Section 8(a)(3) of the Act where union activity was involved. *Stephens Media, LLC*, 356 NLRB No. 63 (2011). I find that this is not one of those situations. Although Mancini recommended that he obtain statements from employees who witnessed the incident with Araru, the statements and petition that he obtained talks about his good character and her rudeness; apparently, none of the employees who signed the petition witnessed the incident. In addition, there is no evidence that the Respondent had any knowledge of the advice that Mancini gave to him. I therefore recommend that the 8(a)(1) and (3) allegation herein be dismissed.

The remaining allegation is that Respondent, by Timothy, threatened employees with discharge for engaging in concerted activities. This allegation is supported by Dela Paz’ testimony that when he gave the updated petition to Timothy on June 18, Timothy told him that if he accepted the petition, Dela Paz might be fired. As I have found that Dela Paz’ petition was personal in nature, and did not constitute protected concerted activities, I recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about June 11 and July 3, Respondent has maintained an overly broad and discriminatory rule prohibiting

³ *Meyers Industries*, 268 NLRB 493 (1984), and *Meyers Industries*, 281 NLRB 882 (1986).

⁴ *Gartner-Harf Co.*, 308 NLRB 531 fn. 1 (1992).

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its employees from engaging in protected concerted activities and from discussing discipline issued to them in violation of Section 8(a)(1) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by discharging Dela Paz on about July 3, for violating the overly broad and discriminatory rule described above, when he continued to ask fellow employees to sign a petition supporting him in a dispute that he had with the Respondent.

5. The Respondent did not further violate the Act as alleged in the complaint.

THE REMEDY

The Respondent having discriminatorily discharged Dela Paz, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Respondent to file a special report with the Social Security Administration allocating Vega's backpay to the appropriate calendar quarters and to compensate him for any adverse income tax consequences of receiving his backpay in one lump sum. I also recommend that Respondent be ordered to notify Dela Paz that it has rescinded the overly broad and discriminatory rule wherein it prohibited him from contacting other employees to support him in his dispute with the Respondent, and that it will not enforce it against him when he returns to work.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended⁵

ORDER

The Respondent, Dignity Health, d/b/a St. Rose Dominican Hospitals, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad and discriminatory rule prohibiting its employees from engaging in protected concerted activities and from discussing discipline issued to them.

(b) Discharging or otherwise discriminating against its employees for violating overly broad and discriminatory rules restricting employees in their rights to engage in protected concerted activities within the meaning of Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Dela Paz full and immediate reinstatement to his former job or, if that job no longer exists, to a substantial-

ly equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Notify Dela Paz that it will no longer restrict his right to discuss his discipline with other employees, or otherwise restrict his right to engaged in protected concerted activities.

(c) File a special report with the Social Security Administration allocating Dela Paz' backpay to the appropriate calendar quarters and compensate him for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Dela Paz, and within 3 days thereafter notify him, in writing, that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Henderson, Nevada, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 23, 2013

APPENDIX

NOTICE TO EMPLOYEES

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an overly broad and discriminatory rule prohibiting you from engaging in protected concerted activities or from discussing with other employees discipline that was issued to you.

WE WILL NOT discharge or otherwise discriminate against any of you for violating overly broad and discriminatory rules restricting your right to engage in protected concerted activities,

and WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Michael Dela Paz immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, together with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the discharge of Dela Paz, and WE WILL, within 3 days thereafter, notify him that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind the rule that we established on about June 11 and July 3 unlawfully restricting Michael Dela Paz' ability to engage in protected concerted activities, and WE WILL notify him that this has been done.

DIGNITY HEALTH, D/B/A ST. ROSE DOMINICAN
HOSPITALS